No. 18-966

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Petitioners,

v.

STATE OF NEW YORK, ET AL.,

Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

BRIEF OF RONALD A. CASS AND CHRISTOPHER C. DEMUTH, SR., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	8
I. THE QUESTIONS PRESENTED ARE OF SPECIAL IMPORTANCE	8
A. Judicial Review Should Not Intrude on Discretion Granted to Administrators by Law.	8
B. Except in the Most Extraordinary Circumstances, Courts Should Not Seek Extrinsic Evidence of Administrators' Motives for Actions Challenged Under the APA.	13
II. THE CASE AT BAR IS PARTICULARLY APPROPRIATE FOR ADDRESSING THE QUESTIONS PRESENTED	16
A. The Subject and Setting Aptly Frame the Question Presented Respecting Application of APA § 706(2)(A).	16
B. Review Is Appropriate in Light of the Setting in Which the Court Below Examined Official Motives and the Relation Between Such Inquiries and Concerns for Legitimacy of Judicial Processes and for Separation of Powers.	18
CONCLUSION	22

TABLE OF AUTHORITIES

CASES — Page(s)

American Trucking Associations v. United States, 344 U.S. 298 (1953) 10, 17

Barnhart v. Walton, 535 U.S. 212 (2002) 9, 10

Camp v. Pitts, 411 U.S. 138 (1973) 14

Christopher v. SmithKline Beecham Corp., 132 S.Ct. 2156 (2012) 9, 10

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 17

City of Arlington v. Federal Communications Commission, 133 S.Ct. 1863 (2013) 9

Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 15

Federal Communications Commission v. Fox Television Stations, Inc., 556 U.S. 502 (2009) ..... *passim*

Federal Communications Commission v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) 10, 17

Fiallo v. Bell, 430 U.S. 787 (1977) 11

Heckler v. Chaney, 470 U.S. 821 (1985) 10, 11, 16

TABLE OF AUTHORITIES—Continued

Page(s)

Holder v. Humanitarian Law Project,
561 U.S. 1 (2010) 16

Kisor v. Wilkie,
No. 18-15, cert. granted, Dec. 11, 2018 .. 5, 9, 10

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 4

Morgan v. United States,
304 U.S. 11938) 5, 13, 14

National Cable & Telecommunications Association v. Brand X Internet Services,
545 U.S. 967 (2005) 4, 9

New York v. Department of Commerce,
No. 18-CV-2921
(S.D.N.Y., Jan. 15, 2019) .....*passim*

Pacific States Box & Basket Co. v. White,
296 U.S. 176 (1935) 17

Romer v. Evans,
517 U.S. 620 (1996) 15

Sale v. Hawaiian Centers Council, Inc.,
509 U.S. 155 (1993) 16

Smiley v. Citibank (South Dakota), N.A.,
517 U.S. 735 (1996) 4, 9, 10, 11

Trump v. Hawaii,
No. 17-956 (U.S. Jun. 26, 2018).....*passim*

United States v. Mead Corp.,
533 U.S. 218 (2001) 9, 10

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Morgan,
313 U.S. 409 (1941) 6, 11, 13, 14

United States ex rel. Knauff v. Shaughnessy,
338 U.S. 537 (1950) 16

Webster v. Doe,
486 U.S. 592 (1988) 9, 10, 11, 16

Ziglar v. Abbasi,
137 S.Ct. 1843 (2017) 15, 16

CONSTITUTION

U.S. Const. art. I, § 2, cl. 3 16

STATUTES

Administrative Procedure Act, 5 U.S.C.
§§ 701–706 ..... *passim*

§ 701(a)(2) 12, 17

§ 706(2)(A) ..... *passim*

§ 706(2)(B)–(D) 11

§ 706(2)(F) 12

Census Act of 1790, 1 Stat. 101 17

Census Act of 1954, 68 Stat. 1012,
13 U.S.C. §§ 1 et seq. 17

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779 (2010) 12

Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417 (2017) 18, 21

Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 Geo. Wash. L. Rev. 1294 (2015) 5, 12

Ronald A. Cass, Colin S. Diver, Jack M. Beermann & Jody Freeman, *Administrative Law: Cases and Materials* (7th ed. 2016) 10

Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 Fordham L. Rev. 531 (2018) 5, 12

Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, Geo. Mason Legal Stud. Research Paper No. LS 18-22, Nov. 7, 2018, available at https://www.usgovernmentspending.com/recent_spending .. 19, 20, 21

Ronald A. Cass, *The Rule of Law in America* (2001) 20

TABLE OF AUTHORITIES—Continued

Page(s)

Christopher DeMuth, *OIRA at Thirty*, 63 Admin. L. Rev. 101 (2011) 4

Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (1915 ed.) (1885) 20

Michael Dorf, *Prediction and the Rule of Law*, 42 UCLA L. Rev. 651 (1995) 20

Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452 (1989) 12

Lon L. Fuller, *The Morality of Law* (rev. ed. 1969) 20

Gary S. Lawson, *Reconceptualizing* Chevron *and Discretion: A Comment on Levin and Rubin*, 72 Chi.-Kent L. Rev. 1377 (1997) ... 12

Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. Rich. L. Rev. 633 (2018) 7, 19, 21

Sarah N. Lynch, "Attorney General Vows to Fight Nationwide Injunctions," Reuters, Sep. 13, 2018, available at https://www.reuters.com/article/us-usa-justice-courts/attorney-general-vows-to-fight-nationwide-court-injunctions-idUSKCN1LT34A ... 19

TABLE OF AUTHORITIES—Continued

Page(s)

Alan Neuhaus, "State Attorney Generals Lead the Charge Against President Donald Trump," U.S. News & World Rep., Oct. 27, 2017, available at https://www.usnews.com/news/best-states/articles/2017-10-27/state-attorneys-general-lead-the-charge-against-president-donald-trump 19

Paul Nolette, "State Attorneys General Have Taken Off as a Partisan Force in National Politics," Wash. Post, Oct. 23, 2017, available at https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/23/state-attorneys-general-have-taken-off-as-a-partisan-force-in-national-politics/?utm_term=.e5530ca3ba5b 19, 21

Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Guttman ed., 1997) 20

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989) .. 20

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INTEREST OF *AMICI CURIAE*[1]

Amici are teachers, scholars, and former government officials who each have had extensive engagement with administrative law over a period of more

[1] The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission.

than 40 years. *Amici* have served in a variety of positions in the United States government, including positions in the Executive Office of the President, executive departments, independent agencies, and the judicial branch. *Amici* have been responsible for making decisions in official capacities and for reviewing agency decisions. They also have been deeply involved with organizations devoted to administrative law and have taught classes and written numerous articles and books on matters implicated in the questions presented in this case. This brief reflects *amici*'s long-standing interests in the subject of administrative law and particularly in standards for judicial review of administrative action.

SUMMARY OF ARGUMENT

The petition for *certiorari* presents two critical questions of law in a context (i) that is extremely time-sensitive, (ii) that involves a decision of national importance, and (iii) that directly implicates essential legal rules respecting judicial review of administrative actions. While acknowledging the first two grounds for granting the petition for *certiorari*—the time-sensitivity of the issue and its practical importance apart from the legal questions posed—*amici* possess special competence only on the significance of the legal questions presented and the reasons this case presents those questions in a context that makes review by this Court especially appropriate. Those are the matters addressed in this brief.

The questions presented in the petition for *certiorari* are of great importance. The questions address (1) the manner in which courts decide whether an administrative action is "arbitrary" or "capricious" or "an abuse of discretion" and (2) the degree to which courts

are permitted to inquire into the particular considerations in the mind of an administrator, seeking to obtain information outside the administrative record to determine an administrator's motivation. Both matters are critical to the dividing line between judicial authority and the authority reposed in other branches of government. Indeed, these are vital aspects of assuring that distinct governmental powers remain committed to the branches to which they are constitutionally assigned.

The manner in which decision below is written plainly raises the questions presented respecting the standards that govern judicial review. See *New York v. Department of Commerce*, No. 18-CV-2921, at 194–253 (S.D.N.Y., Jan. 15, 2019) (*SDNY Decision*). Two aspects of that decision both are troubling in their own regard and evidence broader problems of improper judicial review, misunderstanding review provisions embodied in the Administrative Procedure Act (APA), 5 U.S.C. §§ 701–706. The court's misunderstanding of the APA relates to confusion respecting review standards that should be central to this Court's consideration of the petition for *certiorari*.

First, the *SDNY Decision* evidences a striking disregard for limitations associated with review of matters committed to the discretion of administrative officers. These matters are *not* reviewed to determine their consistency with a judge's view of better reasoning or of more thoughtfully balanced decision-making. Instead, review should assess whether a decision is so far outside the bounds of reasoned decision-making as to constitute action that is arbitrary (i.e., unreasoned), capricious (based on whim), or abuses discretion (based on reasons that cannot possibly be credited as appropriate grounds for the action being reviewed).

Federal Communications Commission v. Fox Television Stations, Inc., 556 U.S. 502, 511–14 (2009) (*Fox Television Stations*); *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 981, 989 (2005) (*Brand X*); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–47 (1996) (*Smiley*).

The *SDNY Decision* describes the course of events that led to the challenged administrative action in great detail. It recites the various considerations advanced by interested parties and those that agency officials offered as well. Yet the tenor of the court's recitation of these considerations, and its subsequent disposition of parties' claims, indicates that the court substituted judicial judgment for administrative judgment. When matters are properly presented to them, courts should not abdicate responsibility for seeing that laws are correctly interpreted and are applied according to the administrators' authorization under law. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). These tasks, however, do not include judicial decision on the *correctness* of administrators' analysis of particular, contested judgments on matters within their discretion. See, e.g., *Fox Television Stations*, 556 U.S. at 511–14. Indeed, the decision below would overstep the bounds of the sort of internal evaluation typically done by executive branch officials reviewing major decisions of other officials—even though executive branch review, which takes place within the same branch authorized to implement the law, is naturally in keeping with a more searching inquiry into the grounds for decision. See, e.g., Christopher DeMuth, *OIRA at Thirty*, 63 Admin. L. Rev. 101, 106 (2011). (One of this brief's *amici* oversaw this process as Director of the Office of Information and Regulatory Affairs. See *id.*)

Clarifying the limits on and appropriate bases for judicial review of decisions committed (in some measure) to administrative discretion is critically important. This has prompted the Court to accept cases that provide opportunity to explicate or to correct standards for judicial review, including in the current Term *Kisor v. Wilkie*, No. 18-15, cert. granted, Dec. 11, 2018 (*Kisor*). In some respects, this case is the other side of the *Kisor* coin: it seeks to clarify terms of and limitations on the scope of judicial review of administrative actions while *Kisor* examines limitations on judicial deference to administrative actions. Both present important issues. They ask this Court to clarify APA review provisions to assure that courts do not excessively defer to administrative decisions on issues that are core matters of legal interpretation committed to the courts *and* that courts do not excessively intrude on administrative decisions committed by law to agency discretion. See, e.g., Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 Fordham L. Rev. 531 (2018) (Auer *Deference*); Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 Geo. Wash. L. Rev. 1294 (2015) (*Rethinking*).

Second, the *SDNY Decision* makes a mistake that is both contrary to law and dangerous in its potential effects on governance by seeking to plumb the *motivation* of administrative decision-makers, rather than evaluating the consistency of their *actions* with legal standards. See *SDNY Decision*, at 31–102, 245–53. This Court has made clear that, in general, for a court reviewing agency action, it is "not the function of the court to probe the mental processes" of the administrator. *Morgan v. United States*, 304 U.S. 1, 18 (1938) (*Morgan II*). The Court has warned that delving into the motives and thought processes of a decision-

maker in a co-equal branch of government would be "destructive" of the responsibility of administrators and would undermine "the integrity of the administrative process." *United States v. Morgan*, 313 U.S. 409, 422 (1941) (*Morgan IV*).

Last term, in *Trump v. Hawaii*, No. 17-956 (U.S. Jun. 26, 2018) (*Trump v. Hawaii*), this Court examined another challenge to an administrative action predicated in part on the assertion that claimed bases for the action were pretextual and that the actual bases were constitutionally proscribed (so that the action assertedly violated plaintiffs' legal rights). The Court stated that there are exceptions to the general rule that courts will not look behind the stated reasons for administrative action, but those exceptions are narrow and highly unusual. See *Trump v. Hawaii*, maj. op., slip op. at 32–33. The Court concluded that the exceptions did not apply, see *id.*, maj. op., slip op. at 32–34, and proceeded to review the challenged action to see if it was supported by a merely rational basis, see *id.*, maj. op., slip op. at 33–37.

The question when courts may undertake an examination of administrative motivation is both critical and contested. Compare *id.*, maj. op., slip op. at 32–33, with *id.*, slip op. at 3–8 (Breyer, J., dissenting) (making an "as applied" assessment of the bona fides of the asserted bases for the administrative action); *id.*, slip op. at 1–23 (Sotomayor, J., dissenting) (assessing purpose of administrative action based on extrinsic evidence). Those are reasons to grant *certiorari* in this case. In addition, the capacity that inquiring into administrative motives has for corrupting the judicial review process—for deflecting review from the sort of constrained inquiries provided for in

the APA—itself has great importance, both practical and legal.

Amici strongly support the Court's traditional reluctance to examine the motives of administrative decision-makers exercising legally granted authority. Having been government decision-makers as well as academic critics of government decisions, *amici* underscore the threat to constitutionally separated powers if reviewing judges seek to plumb the motives of officials in co-equal branches of government. Except for the most unusual circumstances, that inquiry is not appropriate, especially if it relies on extrinsic evidence, and most emphatically if it is based on queries to or examination of decision-makers. It will chill discussion of potential government actions among a wider circle of officials—even though exposure to a broader set of officials is often more consistent with good decision-making.

Finally, changing the traditional, APA-based standard of review to accommodate inquiries into official motives encourages use of judicial review not strictly as a means for keeping official actions within *legal* bounds but as extensions of *political* disputes into the judicial domain. This undermines the perceived legitimacy of the courts and intrudes on decisions committed to other branches. Those concerns have been voiced in connection with discussion of the scope of judicial remedies and their implications for forum-shopping. See, e.g., *Trump v. Hawaii*, slip op. at 5–10 (Thomas, J., dissenting). The use of judicial challenges as political weapons has been observed by others, including politically-selected officials who have participated in them. See, e.g., Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. Rich. L. Rev. 633 (2018) (describing

coordination among politically-allied state attorneys general and other groups in legal challenges). Concerns about that use of judicial process add to the reasons why review of the questions presented in this case would be timely even apart from the importance and time-sensitivity of the particular decision at issue.

ARGUMENT

I. THE QUESTIONS PRESENTED ARE OF SPECIAL IMPORTANCE.

The questions presented are of great importance. They require attention to (1) standards for judicial decision whether a challenged agency action is "arbitrary" or "capricious" under the APA, and (2) the degree to which courts may inquire into the considerations in the mind of an administrator (not articulated in publicly described reasons for a given action), seeking information outside the administrative record to determine an administrator's motivation. These matters are critical to the dividing line between judicial authority and the authority reposed in other branches of government. The legal rules at issue are central to assuring that distinct governmental powers given to different branches of government remain committed to the branches to which they are constitutionally assigned.

A. Judicial Review Should Not Intrude on Discretion Granted to Administrators by Law.

Concerns over preserving constitutional and legal rules cannot focus solely on whether courts give excessive deference to administrative actions or, at the other extreme, whether courts intrude excessively into the domain of decision-making assigned to other

branches of government. Excessive deference to exercises of executive power can undermine constitutional limitations on government and compromise rule-of-law values; but so, too, can excessive judicial intrusion in matters properly committed by law to administrative determination.

Recognizing the potential significance of both sorts of legal error, along with the frequency of debate over the contours of tests for judicial review of administrative actions, this Court in recent years has accepted a number of cases focusing on legal rules governing judicial review. See, e.g., *Kisor*; *City of Arlington v. Federal Communications Commission*, 133 S.Ct. 1863 (2013) (*City of Arlington*); *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156 (2012) (*Christopher*); *Barnhart v. Walton*, 535 U.S. 212 (2002) (*Barnhart*); *United States v. Mead Corp.*, 533 U.S. 218 (2001) (*Mead*). The issues at the center of this case, which also focus on the rules governing judicial review, are as consequential as the issues in these other cases.

Further, the questions presented in the petition for *certiorari* invite elucidation of aspects of the law respecting judicial review that complement aspects addressed in most of the cases noted above. The decision below purports to apply review provisions embodied in the APA, 5 U.S.C. §§ 701, 706. See *SDNY Decision*, at 194–253. The court's decision, however, contravenes limitations on judicial review contained in the APA and long recognized by this Court, at a minimum raising questions of great importance concerning what APA review provisions direct and how they apply. See, e.g., *Fox Television Stations*, 556 U.S. at 511–14; *Brand X*, 545 U.S. at 981, 989; *Smiley*, 517 U.S. at 740–47; *Webster v. Doe*, 486 U.S. 592, 600–

01 (1988) (*Webster*); *Heckler v. Chaney*, 470 U.S. 821, 831–35 (1985) (*Chaney*).

Although recent cases, such as *Mead*, *Barnhart*, *Christopher*, and *Kisor*, more often have invited clarification of legal rules respecting the scope of judicial review that had been read as commanding *deference* to administrative actions, other decisions of this Court have plainly articulated the importance of the law's *limitations* on the scope of judicial review. See, e.g., *Fox Television Stations*, 556 U.S. at 511–14; *Smiley*, 517 U.S. at 740–47 (1996); *Webster*, 486 U.S. at 600–01; *Chaney*, 470 U.S. at 831–35; *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 813–14 (1978) (*Citizens Committee*); *American Trucking Associations v. United States*, 344 U.S. 298, 314–15 (1953) (*Trucking Associations*). That aspect of judicial review is central to the questions presented in this case.

The first question for which the United States seeks *certiorari* in this case addresses the lower court's application of the APA's provision respecting review of agency action for which there is lawfully delegated administrative discretion, 5 U.S.C. § 706(2)(A). In the view of *amici*, the decision below seriously misapplies that provision.

APA § 706(2)(A) was designed primarily as a modest, focused check on the exercise of administrative discretion, see, e.g., Ronald A. Cass, Colin S. Diver, Jack M. Beermann & Jody Freeman, *Administrative Law: Cases and Materials* 126–27 (7th ed. 2016); *Trucking Associations*, 344 U.S. at 314–15. But the court below conducted the judicial review function in a manner more akin to *de novo* review than to the limited review provided for under that APA section.

The district court effectively compares the administrator's judgments leading to and supporting the action taken to the court's *own* view of *better* judgments, ones more sensitive to concerns that resonate with the district judge and that balance costs and benefits in a manner more congenial to the judge. See *SDNY Decision*, at 225–45. Despite the care taken in delineating reasons for preferring a different set of evaluations to those made by the Secretary of Commerce, the district court's approach completely misunderstands the standard for review in APA § 706(2)(A). See, e.g., *Fox Television Stations*, 556 U.S. at 511–14; *Smiley*, 517 U.S. at 740–47 (1996). The skepticism of the court below respecting all aspects of the administrative decision permeates the court's discussion, including discussion of the administrative action's consistency with APA § 706(2)(A), underscoring the intrusive nature of the court's review.

The lower court's misunderstanding presents a special difficulty when applied to a matter of great public import; but, even more relevant to the interests of *amici*, it threatens to undermine the division between courts' role and the role constitutionally assigned to the political branches. Cf. *Trump v. Hawaii*, slip op. at 5–10 (Thomas, J., concurring) (discussing threat to constitutional structure from judicial remedies that unduly intrude into decisions committed to political branches). Sensitivity to the importance of this dividing line—to the separation of powers that is central to constitutional structures—is visible in numerous cautions from this Court respecting the limits of judicial review. See, e.g., *Trump v. Hawaii*, maj. op., slip op. at 30–32; *Webster*, 486 U.S. at 600–01; *Chaney*, 470 U.S. at 830–35; *Fiallo v. Bell*, 430 U.S. 787, 792, 799 (1977); *Morgan IV*, 313 U.S. at 422. The same can be said of standards, such as those in 5 U.S.C. §§ 706(2)(B)–(D),

(F), which are less deferential but address matters within the core competence (and legal assignment) of the judiciary. See, e.g., Cass, *Rethinking*, *supra* at 1313–14. See also Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 788 (2010); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 472–75 (1989); Gary S. Lawson, *Reconceptualizing* Chevron *and Discretion: A Comment on Levin and Rubin*, 72 Chi.-Kent L. Rev. 1377, 1377–78 (1997).

The APA standards of review encompassed in 5 U.S.C. § 706(2)(A)—review to identify "arbitrary" or "capricious" actions or actions that constitute an "abuse of discretion"—are not intended to require thoroughgoing justification of administrative decisions. They merely provide a check against actions that violate the most basic requirements of reasoned decision-making. That standard is plainly consistent with the assignment of discretion to administrators and with the division of responsibilities among the branches. See, e.g., Cass, Auer *Deference*, *supra* at 538–39. It is consistent as well with the APA provision that makes judicial review unavailable in all settings "to the extent that . . . agency action is committed to agency discretion by law," 5 U.S.C. § 701(a)(2). See, e.g., Cass, Auer *Deference*, *supra* at 539–41.

The question presented here, however, is whether § 706(2)(A) can be read to provide for the sort of searching review evident in the *SDNY Decision*, and, if so, whether that can co-exist with accepted legal and constitutional standards. The prevalence of discretion

of some magnitude in legally authorized administrative functions makes this a question of major significance.

B. Except in Extraordinary Circumstances, Courts Should Not Seek Extrinsic Evidence of Administrators' Motives for Actions Challenged Under the APA.

The second question for which *certiorari* is requested—whether the court below improperly sought and based its decision on extrinsic information respecting (or from which the court inferred) the motivations behind the action by the Secretary of Commerce—also presents a matter of both considerable and increasing importance.

The starting point for evaluation of the issue, as this Court has stated repeatedly over the past three-quarters of a century, is the longstanding rule that, in general, when reviewing agency action, it is "not the function of the court to probe the mental processes" of the administrator. *Morgan II*, 304 U.S. at 18. Three years later, in a continuation of the litigation that first elicited Chief Justice Hughes' memorable phrase, Justice Frankfurter, writing for the Court, repeated that remonstrance. He coupled it with the observation that seeking to examine the motivations of an administrator—like seeking to examine the motivations of a judge—would be "destructive" of the "responsibility" of the official whose motivations are the subject of inquiry and would undermine "the integrity of the administrative process." *Morgan IV*, 313 U.S. at 422.

In particular, this Court has made plain that use of judicial processes such as hearings and depositions to inquire directly into the thinking of administrative

decision-makers is inappropriate. That was the focus of the second of the four *Morgan* cases decided by this Court. See *Morgan II*, 304 U.S. at 18.

Justice Frankfurter's analogy to probing the actual motivation behind a judicial decision is apt. See *Morgan IV*, 313 U.S. at 422. Disappointed litigants and other critics of judicial decisions may be so certain of the correctness of their position that they greet any contrary decision with suspicion. Every judge is familiar with speculation that something in the judge's background, personal life, religion, or past political associations explains the *real* basis for a decision. Yet appellate courts routinely review lower court decisions for consistency with the law and do not permit counsel directly to question a judge about his or her thought processes leading to a decision or to subpoena law clerks for similar inquiries.

This Court has made plain that the role of a court reviewing administrative actions is comparably circumscribed. Courts properly look at the administrative record and base a judgment on that; they do not hold hearings on the decision-maker's thinking about the action taken or try to divine that from other extrinsic evidence. See, e.g., *Trump v. Hawaii*, maj. op., slip op. at 32–33; *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973); *Morgan IV*, 313 U.S. at 422; *Morgan II*, 304 U.S. at 18.

In general, the appropriate judicial inquiry asks whether the official who has taken the challenged administrative action can offer an explanation stating considerations that either plausibly or rationally support the action taken. See, e.g., *Trump v. Hawaii*, maj. op., slip op. at 32–34. As a rule, a contention that an official has offered reasons in support of an action as mere pretexts to obscure an inappropriate basis for

action, such as bias in favor of one party or against another party, will not be entertained. That is true both in the context of APA challenges to decisions that are largely within the deciding official's discretion and in the context of challenges under other auspices, such as claims predicated on constitutional violations for which plaintiffs assert a cause of action implied in the constitutional right. See, e.g., *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017) (*Ziglar*).

This Court has recognized exceptional cases in which claims have been accepted that "it is impossible to 'discern a relationship to legitimate state interests,' or that the policy is inexplicable by anything but animus.'" *Trump v. Hawaii*, maj. op., slip op. at 33 (quoting *Romer v. Evans*, 517 U.S. 620, 632, 635 (1996) (*Romer*)). Those are cases involving actions that "lack any purpose other than a 'bare . . . desire to harm a politically unpopular group.'" *Trump v. Hawaii*, maj. op., slip op. at 33 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (*Moreno*)).

This is an exceedingly narrow category of cases and an exception not applicable here. Yet, even in these cases, the sort of inquiries conducted by the court below—seeking evidence that the explanations given were in fact pretextual—would be unacceptable. Expanding this narrow category of cases such as *Romer* and *Moreno* to cases such as the instant case would threaten to convert routine disputes over government policy into debates over the *bona fides* of the decision-makers. As Justice Frankfurter's analogy to judicial decisions illustrates, the distinction between reviewing a decision and seeking to divine the motivation of the decision-maker is essential to maintaining proper respect for government.

II. THE CASE AT BAR IS PARTICULARLY APPROPRIATE FOR ADDRESSING THE QUESTIONS PRESENTED.

A. The Subject and Setting Aptly Frame the Question Presented Respecting Application of APA § 706(2)(A).

This case provides a signal opportunity to clarify the nature of the APA standard for scrutinizing whether administrative actions are "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Many cases that notably address the limited character of review under § 706(2)(A) or related statutory review provisions involve matters that are associated with immigration, foreign relations, military or national security, prosecutorial discretion, or other subjects on which peculiarly strong deference is given to executive authority. See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010); *Sale v. Hawaiian Centers Council, Inc.*, 509 U.S. 155, 187–88 (1993); *Webster*, 486 U.S. at 600–01; *Chaney*, 470 U.S. at 831–35. Similar statements about the narrowness of judicial review of decisions within the core of executive authority have been made in other contexts as well. See, e.g., *Trump v. Hawaii*, maj. op., slip op. at 8–24; *Ziglar*, 137 S.Ct. at 1861–62; *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542–43 (1950).

Although in this case the issue arguably lies within a similarly central executive function, the question is presented in a context that is separate from the sort of national security, foreign affairs, or military decisions for which the executive branch enjoys constitutionally, as well as statutorily, committed authority. Responsibility for the decennial census is constitutionally assigned to Congress, see U.S. Const., art. I, sec. 2, cl. 3, and responsibility for conducting the census is

delegated to administrators by law. Congress first assigned that function to marshals. See Census Act of 1790, 1 Stat. 101. Currently, the responsibility for conducting the census and making decisions in support of that task resides with the Department of Commerce. See Census Act of 1954, 68 Stat. 1012, 13 U.S.C. §§ 1 et seq. The law provides broad discretion to the Secretary of Commerce. See, e.g., *id.* at §§ 4, 141. This setting provides an opportunity to define more clearly the nature and limits of APA review of discretionary actions for which there is review "to the extent that" matters are not "committed to agency discretion." 5 U.S.C. §§ 701(a)(2), 706(2)(A).

The limited nature of such review was clearly understood in cases that preceded the APA and many decided following the APA's enactment. See, e.g., *Citizens Committee*, 436 U.S. at 813–14; *Trucking Associations*, 344 U.S. at 314–15; *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185–86 (1935). That understanding has been reaffirmed more recently as well. See, e.g., *Fox Television Stations*, 556 U.S. at 511–14.

Nonetheless, courts have relied on statements in decisions such as *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (*Overton Park*), respecting the need for an inquiry that is "searching and careful," to support review that goes well beyond assuring that exercises of discretionary authority are not arbitrary or capricious or an abuse of discretion. See, e.g., *SDNY Decision*, at 197. That occurs even though *Overton Park* also cautioned that the "standard of review is a narrow one." *Overton Park*, 401 U.S. at 416. Given the broad range of discretionary decisions assigned to administrators and the frequency of requests to review actions that reflect some degree of

delegated discretion, the appropriate standard for review of such actions is an issue of extreme importance.

This case also presents an appropriate vehicle for clarifying the meaning of the APA because it presents the standard of review question in plain terms. The decision below unarguably delves deeply into—and provides the court's own contrary evaluation of factors relevant to—the particular judgments made by the relevant administrative officials. See *SDNY Decision*, at 194–253. The record for review on this question, thus, is especially clear.

B. Review Is Appropriate in Light of the Setting in Which the Court Below Examined Official Motives and the Relation Between Such Inquiries and Concerns for Legitimacy of Judicial Processes and for Separation of Powers.

Finally, it is particularly fitting to review the decision below because of its connection to a development in litigation that presents potential systemic issues for the courts, especially when coupled with actions such as those taken by the district court. In recent years, litigation has been used as an extension of political conflicts, with litigants who are politically-selected among the parties seeking judicial review of administrative actions presenting legal questions closely related to or identical to politically-contested issues. This development, and problems associated with it, have been noted by judges, scholars, public officials, and news media. See, e.g., *Trump v. Hawaii*, slip op. at 5–10 (Thomas, J., dissenting); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 457—61 (2017);

Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, Geo. Mason Legal Stud. Research Paper No. LS 18-22, Nov. 7, 2018, at 20–32, available at https://www.usgovernmentspending.com/recent_spending (*Nationwide Injunctions*); Lin, *supra*, at 634–46; Sarah N. Lynch, "Attorney General Vows to Fight Nationwide Injunctions," Reuters, Sep. 13, 2018, available at https://www.reuters.com/article/us-usa-justice-courts/attorney-general-vows-to-fight-nationwide-court-injunctions-idUSKCN1LT34A; Alan Neuhaus, "State Attorney Generals Lead the Charge Against President Donald Trump," U.S. News & World Rep., Oct. 27, 2017, available at https://www.usnews.com/news/best-states/articles/2017-10-27/state-attorneys-general-lead-the-charge-against-president-donald-trump; Paul Nolette, "State Attorneys General Have Taken Off as a Partisan Force in National Politics," Wash. Post, Oct. 23, 2017, available at https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/23/state-attorneys-general-have-taken-off-as-a-partisan-force-in-national-politics/?utm_term=.e5530ca3ba5b.

Lower court inquiries into matters such as officials' motives for the actions being reviewed exacerbate problems associated with complaints about politicization of judicial process. Questions respecting unstated motives for official action necessarily require much more subjective inquiries than asking whether there is evidence of arbitrariness or capriciousness or other grounds specified in the APA as originally understood. Legal tests that turn on more subjective judgments at times are appropriate, but in general such tests reduce the clarity of decisions and provide increased scope for intrusion of considerations apart from those readily identified as relevant to the merits of the legal dispute.

Similar observations underlie calls for narrower, more certain legal tests and more narrowly confined sources of decision; these have come from scholars and jurists of widely divergent views in an array of disparate contexts. See, e.g., Ronald A. Cass, *The Rule of Law in America* 4–20, 28–29 (2001); Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* 110 (1915 ed.) (1885); Lon L. Fuller, *The Morality of Law* 46–94, 209–13 (rev. ed. 1969); Michael Dorf, *Prediction and the Rule of Law*, 42 UCLA L. Rev. 651, 689–90 (1995); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176, 1178–83 (1989).

Less clarity in the tests applied and a wider set of relevant materials to decision increases the dispersion of potential outcomes across decision-makers, reducing reliability and increasing incentives to seek out decision-makers who are predicted to be more inclined toward specific (favored) outcomes. See, e.g., Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 14–41 (Amy Guttman ed., 1997); Cass, *Nationwide Injunctions*, *supra* at 20–27. When the issues presented for decision or the settings in which they are presented overlap with political disputes, the incentives for forum-shopping can have especially pernicious effects. These include changes in the perceived legitimacy of judicial decisions and their potential intrusion into responsibilities committed to other branches of government.

The overlap between concerns about political characterization of decisions and the use of legal tests that permit inquiry into decision-makers' motivations is starkly illustrated by the decision below. The district court went through the administrative record and extrinsic evidence adduced in lower court proceedings

to discern whether political considerations played a part in the Secretary of Commerce's decision to add a question to the 2020 decennial census. See *SDNY Decision*, at 26–102, 204–07. The decision suggests that they did, finding that the Secretary's real reasons for his action were hidden from the court, were unrelated to his stated rationale, and produced a bias so strong that he could not rationally consider the effects of his decision. *Id.* at 245–53. Yet, even a sincere effort to deduce the motivations of a decision-maker is an exercise in guesswork. Different reviewers of the same record easily can reach different conclusions.

Uneven application of less-constraining legal tests, the potential for application of such tests to vary across courts, and the potential for politically-connected litigants to seek out specific courts to decide legal questions that have political significance, together threaten to undermine confidence in our courts. See, e.g., Bray, *supra* at 457–61; Cass, *Nationwide Injunctions*, *supra* at 20–32; Lin, *supra* at 634–46; Nolette, *supra*. Those concerns provide an additional reason to grant the petition for *certiorari* in this case.

This case provides an opportunity to clarify the appropriate legal tests to be used and once again to state clearly that inquiries into decision-makers' motives are strongly disfavored, especially if accomplished through trial proceedings designed to adduce information not in the written record. Inquiry into motives leads to unnecessary friction with other branches of government and to questions about the role of the courts. Addressing the legal questions raised in this case could ameliorate these concerns.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted,

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